In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 485

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS UNION, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Petitioner*,

vs.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING COMPANY, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF

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OPINIONS BELOW

The opinion of District Court (R. 276-290) is reported 200 F.Supp. 653. The opinion of the Court below (R. 291-296) is reported in 320 F.2d 505.

JURISDICTION

The judgment of the Court below was entered on July 25, 1963. The petition for writ of certiorari was filed on September 20, 1963 and was granted on December 9, 1963. The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of preemption of labor disputes bars a federal court from exercising pendent ju-

risdiction to award actual and punitive damages based upon alleged violations of state common law where as here the alleged violations do not arise under Section 303 of the Taft-Hartley Act and where as here the doctrine of preemption bars state courts from awarding either actual or punitive damages based upon such alleged violations of state law.

2. Whether Section 303 of the Taft-Hartley Act authorizes an award of total actual damages for injury resulting directly from a lawful primary strike merely because the Union also engaged in other conduct which was found to be in violation of Section 303.

STATUTE INVOLVED

The statutory provision involved is Section 303 of the Labor-Management Relations Act of 1947, 61 Stat. 158, 29 USC, Section 187 (referred to as the "Act"). It is printed in Appendix A, *infra,* pp. 49-50. Although certain amendments to Section 303 were made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 545, 29 USC Sec. 187, such amendments are not germane to the questions presented in this case.

STATEMENT

The Petitioner, Local 20, Teamsters, Chauffeurs, and Helpers Union (referred to as "Local 20") is a labor organization and has its principal office in Toledo, Ohio (R. 95, 100). Respondent Lester Morton, d/b/a Lester Morton Trucking Company (referred to as "Respondent") is engaged in the operation of dump trucks and maintains his principal place of business in Tiffin, Ohio (R. 180).

In this case the courts below have asserted jurisdiction under Section 303 of the Act, and awarded damages in the amount of $1,600 based upon conduct found unlawful under Section 303. An additional $9,300 damages were awarded "under the totality of effort rule" (R. 284) even though Respondent has conceded that "there is no evidence of an unlawful activity in connection with" such loss (R. 166). Moreover the courts below have asserted "pendent" jurisdiction to award $8,700 actual and $15,000 punitive damages based upon "the Ohio common law regarding unlawful secondary activity" (R. 275-276). Pendent jurisdiction over this state claim was asserted notwithstanding: (1) the finding that Local 20's conduct was at all times peaceful (R. 282); and (2) the prior determination of the Ohio courts that such state courts had no jurisdiction to entertain Respondent's claim of common law secondary boycott (R. 266). The facts are set forth below.

(A. The Primary Strike)

Local 20 represented Respondent's employees from 1950 until 1956 under an oral agreement (R. 18-19, 30-31). During 1956 Local 20, in an effort to secure a written agreement held a series of meetings with Respondent (R. 20-21, 25-26, 185, 188-192, 201-209, 229-230). During the course of these negotiations an impasse developed over Respondent's demand that any written agreement be conditioned upon Local 20 securing similar written agreements covering Respondent's competitors (R. 34-36, 40, 204, 205-207, 233, 241, 251-252, 253-260). This impasse precipitated a strike

which commenced on April 17, 1956 (R. 180, 185) and terminated in early October, 1956 (R. 185) when Respondent entered into a written contract with Local 20 (R. 188-189).

Local 20 engaged in peaceful picketing at Respondent's premises during the course of the strike (R. 25-26, 45-46, 63-64, 222-224). There was no interference with ingress or egress at any time during the strike (R. 37-38, 63-64), and no physical injury to person or property occurred (R. 37-38, 197-199, 271, 282). Some of Respondent's employees worked on the first day of the strike and continued to work through the strike (R. 82-83, 91, 222, 224, 252). In addition new employees were hired during the strike (R. 224).

(B. The State Common Law "Secondary Boycott")

During the strike, Local 20 engaged in certain conduct which according to the District Court and the Court of Appeals, constituted a "secondary boycott" under the law of Ohio (R. 275-276, 292). The four suppliers or customers involved and the facts relating to each, as determined by the lower courts, are as follows:

(1. Launder Account)

At the time of the strike Respondent was hauling ingredients for cement to be used in connection with a highway construction project. Respondent was performing this work under a subcontract from Launder & Sons, Inc. (referred to as "Launder") (R. 273). During the course of the strike Local 20 requested the management of Launder to refrain from using Respondent's trucks (R. 273). As a result of this request

Launder ceased doing business with Morton until the strike was ended (R. 273). Damages in the amount of $8,700* were awarded by the District Court (R. 289) and this award was affirmed by the Court of Appeals.

(2. O'Connell Account)

According to the courts below Local 20 requested the cooperation of the management of the Louis O'Connell Coal Co. (referred to as "O'Connell") and encouraged O'Connell's employees to engage in a concerted refusal to "use" Respondent's trucks for the purpose of causing O'Connell to cease doing business with Respondent (R. 272). As a result, O'Connell ceased doing business with Respondent for the duration of the strike (R. 273). Damages in the amount of $1,600 were awarded by the District Court and this award was affirmed by the Court of Appeals (R. 289, 295).

(3. France & Schoen Accounts)

The courts below also found that Local 20 encouraged the employees of France Stone Company (referred to as "France") and the employees of C. A. Schoen, Inc. (referred to as "Schoen") to engage in a "concerted refusal to load" Respondent's trucks for the purpose of requiring France (R. 272) and Schoen (R. 273) to cease doing business with Respondent. It is undisputed that there was no work stoppage or slowdown by either France (R. 51, 66-67, 80, 100, 107) or Schoen (R. 71-72) employees. No damages were claimed (R. 141, 249) or awarded (R. 273) in connection with the alleged inducement of the France and Schoen employees.

*References to damages will be made in round figures.

Compensatory damages of $10,300 (Launder $8,700 and O'Connell $1,600) and punitive damages in the amount of $15,000 were awarded by the District Court on the theory that Local 20 by the conduct set forth above "violated the Ohio common law regarding unlawful secondary activity" (R. 275-276). The District Court's theory of liability and its award of damages were approved by the Court of Appeals (R. 295-296). The District Court and the Court of Appeals thought it immaterial that: (1) Local 20's conduct giving rise to the claim of common law secondary boycott was peaceful (R. 289, 292-293), and (2) the state courts of Ohio had previously held that such state courts were without jurisdiction to award damages based upon Respondent's claim of common law secondary boycott (R. 293).

(C. The Alleged Section 303 Violations)

(1. O'Connell, France & Schoen Accounts)

The court's below also concluded that Local 20's conduct in connection with France (no damages), Schoen (no damages) and O'Connell ($1,600 damages) violated Section 303 of the Act. Viewed most strongly in Respondent's favor, the evidence with regard to O'Connell shows only that Local 20 advised its steward employed by O'Connell of the strike against Respondent and requested him to refrain from using Respondent's trucks (R. 122). The steward had no occasion in the course of his employment to operate Respondent's trucks and had no authority to terminate Respondent's relation with O'Connell (R. 124). Accordingly, the steward reported his conversation to the O'Con-

nell management (R. 122-126). Upon learning that a strike had been called against Respondent the O'Connell management arranged for other trucking services (R. 127). There were no strikes, picketing or threats of strikes or picketing against O'Connell (R. 129).

(2. Wilson Account)

Prior to the strike, Respondent was performing work for Wilson Sand & Gravel Co. (referred to as "Wilson"). Respondent conceded that there is "no evidence of an unlawful activity in connection with this particular job" (R. 166). It is undisputed that the Wilson work was lost for the duration of the strike because of a lack of drivers during the strike (R. 171, 173, 184). Compensatory damages in the amount of $9,300 were awarded because of the loss of revenue from Wilson. The District Court assessed these damages "under the totality of effort rule" (R. 284). Although Local 20 devoted one-third of its brief in the Court of Appeals to an attack upon the "totality of effort rule" the Court of Appeals affirmed the District Court without addressing itself to this issue.

Local 20's petition for writ of certiorari has been granted.

SUMMARY OF ARGUMENT

A peaceful strike by Respondent's employees, who were represented by Local 20, occurred in 1956. During the course of the strike Local 20 engaged in certain conduct which violated no federal law. However, this peaceful conduct was said to be unlawful under Ohio common law and the courts below have awarded sub-

stantial compensatory and punitive damages under Ohio common law. The jurisdiction of the courts below to award compensatory damages for injury proximately caused by conduct which is unlawful under Section 303 of the Act is not in issue. But the jurisdiction of the courts below to award either actual or punitive damages under Ohio common law is in issue.

Repeatedly this Court has held that the National Board alone is authorized to regulate peaceful picketing and boycott activities. See *e.g. Garner v. Teamsters*, 346 U.S. 485. On a cogently similar record, this Court reversed *per curiam* an award of compensatory and punitive damages which the state courts thought justified by state common law. *Electrical Workers Local 426 v. Baumgartners Elec. Constr. Co.*; 359 U.S. 498. In *Baumgartners* case the plaintiff could have but did not rely upon Section 303; rather, in *Baumgartners* case the plaintiff based his case upon state law. In this case most of the damages which were awarded were said to be authorized under state law. Here, as in *Baumgartners* case, the doctrine of preemption (*i.e.* exclusive National Board authority) bars recovery of such damages.

It is of no significance that the courts below are empowered to award actual damages for injury caused by conduct unlawful under Section 303, for here we are concerned with conduct which did not violate Section 303. Moreover, even if the case were viewed only in terms of Section 303, it nevertheless should be concluded that Section 303 has displaced state law. When Congress enacted Section 303 it intended to assure "uniformity, otherwise lacking, in rights of recovery

in the state courts. . . ." *United Construction Workers v. Laburnam*, 347 U.S. 656, 665-666.

Peaceful picketing and boycott activities are comprehensively regulated by Sections 8(b)(4) and 8(b)(7) of the Act. Congress debated at length not only the question of the type of conduct to be made the subject of damage actions, but also the measure of damages to be allowed. In short, this is an area "of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes rather than local law." *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176. Since state law has been displaced by Section 303, insofar as private damage actions based upon peaceful picketing and boycott activities are concerned, the courts below were without authority to award actual and punitive damages under state law principles.

The decisions of this Court and decisions of the Ohio courts rendered in connection with this dispute, make it clear that the Ohio courts had no jurisdiction to award damages against Local 20. Yet the courts below by a reasoning process which may be characterized as bootstrap-pendent jurisdiction, concluded that there reposed in the federal courts authority to award damages under preempted, non-existent state law. It is sufficient for present purposes to note that if a state court has no authority over a given claim, then it must be held that a federal court exercising pendent or diversity jurisdiction is similarly without jurisdiction. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 328.

The final point to be considered is the "totality of efforts rule" applied by the courts below. In this case the courts below held that Local 20 engaged in conduct at the premises of three of Respondent's customers which violated Section 303. With respect to two of these, no damages were claimed or awarded. Damages in the amount of $1,600 were awarded in connection with the third account (i.e. O'Connell account).

There is no finding, however, that Local 20 by violation of either state or federal law, caused Respondent to lose the Wilson account for which $9300 damages were awarded on the theory of "totality of efforts." It is undisputed that Respondent himself advised Wilson of the strike against Respondent and further advised Wilson that because of the strike Respondent would be unable to perform hauling work for Wilson. Indeed, during the course of the trial, Respondent conceded that there is "no evidence of an unlawful activity in connection with this particular job. . . ." (R. 166).

Primary strikes are protected by Sections 7 and 13 of the Act as well as by the First Amendment to the Federal Constitution. If this protection is to have meaningful content, injury which results from primary strikes must be considered *damnum absque injuriam.*

ARGUMENT

I. The Doctrine of Federal Preemption of Labor Disputes Bars a Federal Court from Exercising Pendent Jurisdiction to Award Actual and Punitive Damages Based Upon Alleged Violations of Common Law Where, as Here, the Alleged Violations Do Not Arise Under Section 303 of the Taft-Hartley Act and Where, as Here, the Doctrine of Preemption Bars State Courts from Awarding Either Actual or Punitive Damages Based Upon Such Alleged Violations of State Law

The dispute out of which this case arose was the subject of damage suits, both in the state courts of Ohio and in the courts below. Throughout the course of this litigation the concept of "jurisdiction" has received important attention. The terms "preemption," exclusive "primary" jurisdiction and "pendent" jurisdiction frequently appear in the record, opinions and briefs of counsel. As labels these terms are useful, but resolution of the issues before this Court obviously cannot be accomplished by appending a label and analyzing the case in light of the particular set of rules associated with the label. Rather as Professor Summers explained, "The critical inquiry is what allocation by the Court will achieve the substantive results sought by Congress."[1]

As we shall demonstrate, Congress intended that, in the absence of violence, the sole and exclusive authority to award damages in favor of an employer on account of union picketing and boycott activity during the course of a labor dispute is embodied in Section 303 of the Act. This result obtains irrespective of whether

[1] Summers, "Labor Decisions of the Supreme Court 1962 Term," 1963 Report ABA Section of Labor Relations Law at pg. 5.

the case is analyzed in terms of the "primary jurisdiction of the National Board" (*San Diego Bldg. Trades v. Garmon,* 359 U.S. 236, 245) or in terms of the congressional intent, in enacting Section 303, to assure "uniformity, otherwise lacking, in rights of recovery in the state courts. . . ." (*United Construction Workers v. Laburnam,* 347 U.S. 656, 665-666) or in terms of "pendent" jurisdiction (Cf. *Lauf v. E. G. Skinner & Co.,* 303 U.S. 323, 328). Moreover, we shall demonstrate that Section 303 contemplates an award of *compensatory* damages for injury proximately resulting from conduct which violates Section 303; no other damages are recoverable. Congress did not and constitutionally could not have contemplated an award of damages for injury proximately resulting from lawful, primary strike activities (*Teamsters Local 795 v. Newell,* 356 U.S. 341 reversing *per curiam* 181 Kan. 898, 317 P.2d 817). The judgment below is at war with these principles.

A. Two-thirds of the damages awarded in this case are based upon a finding that Local 20 engaged in a state common law secondary boycott. Such damages are not based upon and cannot be sustained under Section 303 of the Act.

It will be recalled that during the course of Local 20's strike against Respondent, Local 20 "contacted the management of Launder . . . and asked that [Respondent's] trucks not be permitted to work . . . during the strike" (R. 273). As a result of this request Launder "ceased doing business with" Respondent "until the strike had been terminated" (R. 273). Compensatory damages in the amount of $8,700 were

awarded (R. 289) on the theory that this conduct "violated the Ohio common law regarding unlawful secondary activity" (R. 275-276).

In addition, the courts below concluded that Local 20's peaceful conduct at the France premises, the Schoen premises and the O'Connell premises violated the Ohio common law (R. 275-276). Punitive damages in the amount of $15,000 were awarded solely on the ground that Local 20's activities set forth above constituted a secondary boycott *unlawful under the Ohio common law* (R. 275-276).[2] Thus $23,000 (Launder—$8,700 and punitive $15,000) of the $34,000 damages awarded are based solely on the claim that Local 20 "violated the Ohio common law regarding unlawful secondary activity . . ." (R. 275-276).

Considering first the award of $8,700 for loss of the Launder account, it is indisputable that such award was not and could not be based upon Section 303 of the Act. The district court *expressly* predicated its award of the Launder damages upon Ohio common law (R. 273, 275-276). Respondent has not at any time contended that the compensatory damages awarded for the loss of the Launder account could be awarded under Section 303. Indeed, during oral argument in the court

[2] No *compensatory* damages were claimed (R. 141, 249) or awarded (R. 273) because of the picketing at either Schoen or France. Compensatory damages, in the amount of $1600, were awarded in connection with the O'Connell account. Since, however, the O'Connell damages were held to be recoverable under Section 303, as well as the Ohio common law, we have treated Respondents' right to such *compensatory* damages in connection with our discussion of the principles peculiarly applicable to Section 303. Our purpose at this point is to isolate those portions of the damage award based *solely* upon the Ohio common law.

below. Respondent conceded that such damages could not be awarded under Section 303.

Any possible claim for damages under Section 303, in connection with the Launder account, is totally foreclosed by *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, 98-99, where this Court said:

> "A boycott voluntarily engaged in by a secondary employer for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute."

Although this case arose under the Act as amended in 1947, the subsequent amendments of 1959 have not altered the rule set forth in the *Local 1976* case. See, *e.g.: Carolina Lumber Co.*, 130 NLRB 1438; *NLRB v. Local 294 Teamsters*, 298 F.2d 105 (CA 2); *Alpert v. Local 379, Teamsters*, 184 F.Supp. 358 (D. Mass.). Thus, it is clear that the compensatory damages awarded for loss of the Launder account were not and could not be based upon Section 303.

Similarly, the district court expressly based its award of punitive damages upon the Ohio common law (R. 275-276). To date, Respondent has not suggested that punitive damages are authorized by Section 303. Such a suggestion, if made, would be wholly lacking in merit. The Act itself provides that, "Whoever shall be injured in his business or property by reason of any violation" of Section 303 "Shall recover the damages by him sustained . . . " (29 U.S.C. Sec. 187(b)). This is not the language of punitive damages. Compare, for

example, the Sherman Anti-Trust Act, 15 U.S.C. Sec. 15, which provides for treble damages, costs and a reasonable attorney's fee. During the course of the deliberations in the Senate, when Section 303 was being debated, Senator Taft specifically alluded to this difference between Section 303 and the Sherman Anti-Trust Act. In response to Senator Morse's claim that Section 303 would impose virtually unlimited liability, Senator Taft said (2 Leg. Hist. 1398):

> "Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages."[3]

The courts which have squarely ruled upon the right to punitive damages in Section 303 actions have held that Section 303 does not authorize an award of punitive damages. *United Mine Workers v. Patton*, 211 F.2d 742, 747-750 (CA 4); *Overnight Transportation Co. v. Teamsters*, 257 N.C. 18, 125 S.W. 277, *cert. denied* 371 U.S. 862. *Cf. Harvey Aluminum v. Longshoremen's Union*, 278 F.2d 63 (CA 9).

The language of Section 303, its legislative history and the decided cases are in agreement; Section 303 does not contemplate an award of punitive damages. Hence, the award of punitive damages in this case — which the district court awarded under the Ohio common law—cannot be justified by reference to Section 303 of the Act.[4] The $8,700 compensatory damages

[3] A boycott damage amendment offered by Senator Ball which provided for reasonable attorneys' fees (2 Leg. Hist. 1324) was amended to delete such awards (2 Leg. Hist. 1346) and then defeated entirely (2 Leg. Hist. 1370). See also: 1 Leg. Hist. 168-171, 204-206.

[4] During the trial in the district court Respondent said, "Our claim for

awarded for loss of the Launder account and the $15,000 punitive damages were based upon and can be justified only by reliance upon Ohio common law. As we shall demonstrate, there is no place in the federal labor law scheme for state common law notions.

B. The rule of federal preemption (*i.e.* exclusive primary jurisdiction of the Labor Board) prohibits federal and state courts from awarding damages against unions unless the conduct involved violates Section 303 of the Act.

Later on we will address ourselves directly to the suggestion that the doctrine of primary, exclusive jurisdiction of the Labor Board is *ipso facto* unavailable in a Section 303 action. For present purposes it is sufficient to note that Local 20 does not and has not argued that federal or state courts are deprived of authority to hear evidence and award *compensatory* damages

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punitive damages lies almost entirely upon the fact that the defendant . . . intentionally and wilfully violated a state court order that was in effect throughout the strike" (R. 452a-453a).* Local 20 in its post-trial brief pointed out that a *federal* court has no authority to punish a party for violation of a *state* court order. I Beach on Injunctions, Sec. 277 (1895); *Kirk v. Milwaukee Dust Collector Manf'g Co.*, 26 Fed. 501, 506 (E.D. Wis.); *Wilson v. United States*, 26 F.2d 215, 218 (C.A. 8); *United States v. Berry*, 24 Fed. 863, 868-869 (E.D. Mich.). Local 20 also pointed out that since the Ohio courts had held the subject matter of the dispute to be pre-empted (R. 266), the state court order was void. *In re Green*, 369 U.S. 689. Cf. *Ex parte George*, 371 U.S. 72. After the District Court issued its opinion, Respondent filed findings of fact and conclusions of law asserting that punitive damages were proper since an unlawful common law secondary boycott has been established. This was the theory urged in the court below by Respondent (Appellee's Br., pp. 24-26—The argument appears under a caption entitled "Punitive Damages Are Recoverable for Malicious Torts Under the Common Law of Ohio"). Respondent's brief in opposition filed in this Court suggests that Respondent will seek to justify the award of punitive damages in this case on the ground that violence was involved. But in view of the Respondent's illusive theory of punitive damages, we will await his brief on the merits before discussing the point further.

*This reference is to the certified record filed in this Court.

based upon conduct which the court determines to be *illegal under Section 303*. But Local 20 has consistently asserted that where, as here, a state or federal court in a Section 303 action determines that certain conduct does not violate Section 303, such court is without jurisdiction to invoke *state law* and award damages. Local 20 also has consistently asserted that in the absence of violence, neither state nor federal courts have jurisdiction to award punitive damages based upon either Section 303 or state law principles. In other words, Local 20 challenges in this case an award of compensatory damages (Launder account) and an award of punitive damages which were awarded not under Section 303 of the Act, but under state common law principles. The award of such damages plainly trespasses on the National Board's exclusive jurisdiction.

The range of the Labor Board's exclusive, primary jurisdiction is broad indeed. For example, primary strikes for initial recognition[5] or a new contract[6] are subject to the rule of pre-emption. Even contemporaneous violence will not permit the courts to regulate peaceful conduct in the course of the same dispute.[7] Picketing, though carried on in the absence of a "labor dispute" or for an unlawful purpose as defined by state law, also falls within the Labor Board's exclusive jurisdiction.[8] The same is true of picketing allegedly vio-

[5] *UMW v. Arkansas Oak Flooring Co.*, 351 U.S. 62.

[6] *Amalgamated Ass'n v. Missouri*, 10 L.Ed.2d 763; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; *Amalgamated Ass'n v. Wis. E.R. Bd.*, 340 U.S. 383; *UAW v. O'Brien*, 339 U.S. 454.

[7] *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131.

[8] *Hotel Employees Union v. Sax Enterprises, Inc.*, 358 U.S. 270; *Machinists Lodge 34 v. L. P. Cavett Co.*, 355 U.S. 39; *San Diego Bldg.*

lating a state "right to work" law[9] even though the states have express authority to prohibit union security agreements.[10] Picketing which induces employees of trucking firms to refuse to make deliveries,[11] which seeks to induce a consumer boycott,[12] to induce a breach of contract[13] or which is carried on at a construction job site[14] likewise constitutes conduct within the Labor Board's exclusive jurisdiction.

Assume for the moment that Respondent had filed a complaint merely alleging that Local 20 had engaged in a common law secondary boycott by contacting the Launder management, and assume that the complaint prayed for compensatory and punitive damages. Surely an award of actual and punitive damages based upon such allegations would be summarily reversed on the ground that the National Board had exclusive jurisdiction. *Electrical Workers Local 426 v. Baumgart-*

Trades Council v. Garmon, 353 U.S. 26; *Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, Inc.*, 353 U.S. 20; *Retail Clerks Union v. J. J. Newberry Co.*, 352 U.S. 387; *Garner v. Teamsters Union*, 346 U.S. 485.

[9] *Local No. 438 v. Curry*, 371 U.S. 542; *Farnsworth v. Chambers Co.*, 353 U.S. 969.

[10] *Retail Clerks v. Schermerhorn*, 10 L.Ed.2d 678 and 11 L.Ed.2d 179. *Compare: Teamsters Local 24 v. Oliver*, 358 U.S. 283.

[11] *Teamsters Local 327 v. Kerrigan Iron Works, Inc.* 353 U.S. 968; *General Drivers Local 89 v. American Tobacco Co.*, 348 U.S. 978; *McGrary v. Alladin Radio Indus., Inc.*, 355 U.S. 8.

[12] *Retail Clerks Local 560 v. J. J. Newberry Co.*, 352 U.S. 987.

[13] *Ex parte George*, 371 U.S. 72; *Marine Engineers Ben. Asso. v. Interlake S.S. Co.*, 370 U.S. 173.

[14] *Linet v. Jafco*, 11 L.Ed.2d 347; *Electrical Workers Local 426 v. Baumgartners Elec. Constr. Co.*, 359 U.S. 498; *Plumbers Union Local 298 v. Door County*, 359 U.S. 354; *Pocatello Bldg. & Construction Trades Council v. Kinard Constr. Co.*, 346 U.S. 933.

ners Elec. Construct. Co., 359 U.S. 498, reversing *per curiam* 77 S.D. 286, 91 N.W.2d 663. Yet the courts below on indistinguishable facts awarded compensatory and punitive damages, and in doing so trespassed upon the Labor Board's domain.

Cases involving violence and mass picketing are in no way inconsistent with the decisions under consideration, nor are such cases factually apposite. This Court repeatedly has sustained the right of the several states to regulate violence and mass picketing.[15] State authority to regulate such conduct has been recognized because Congress so intended. *United Construction Workers v. Laburnam*, 347 U.S. 656, 666-670.

The well-defined distinction between cases involving peaceful picketing and boycott activities, with respect to which state law has been extinguished, and cases involving mass picketing and violence, in which state authority is recognized, is emphasized by this Court's decision in *Electrical Workers Local 426 v. Baumgartners Elec. Constr. Co.*, 359 U.S. 498. In the *Baumgartners* case the state court sustained an award of *actual and punitive* damages based on peaceful picketing at certain construction job sites. The picketing resulted in work stoppages by employees of secondary employees. These work stoppages in turn resulted in the loss of certain work by the Baumgartner firm. As the state court itself noted, the plaintiff in *Baumgartners* case could have (91 N.W.2d at 669) but did not make a "[r]equest for application of Sec. 303, 61 Stat. 158, 159,

[15] *Auto Workers v. Russell*, 356 U.S. 634; *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131; *Auto Workers v. Wis. E.R. Board*, 351 U.S. 266; *United Construction Workers v. Laburnam*, 347 U.S. 656; *Allen Bradley Local 1111 v. Wis. E.R. Board*, 315 U.S. 740.

29 U.S.C.A. Sec. 187(b) . . . " (91 N.W.2d at 670). Rather, the plaintiff based its case on the state right to work law (91 N.W.2d at 666). Rejecting the union's claim of preemption, the state court stated (91 N.W.2d at 670):

> "The defendants contend that the Congress having preempted the jurisdiction of the courts to grant equitable relief against the exhibited conduct of defendants, it must have intended to preempt the jurisdiction of the state courts to impose sanctions by way of damages for injuries to business resulting from that conduct.
>
> "It is our understanding that the Supreme Court has expressed a contrary view in *United Construction Workers v. Laburnum Construction Corporation*, 347 U.S. 656, and in *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, et al. v. Paul S. Russell*, 356 U.S. 634. And see *San Diego Building Trades Council v. Garmon*, 353 U.S. 26, and *Garmon v. San Diego Trades Council*, — Cal. —, 320 P.2d 473. Therefore, we hold the contention to be inadmissible."

On writ of certiorari this Court reversed, *per curiam*, citing *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236.

In *Garmon*—an action in which *state law* was relied upon to justify an award of damages for losses resulting from peaceful picketing and boycott activities — this Court said (359 U.S. at 245, 246-247):

> "When an activity is arguably subject to Sec. 7 or 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger

of state interference with national policy is to be averted.

* * *

"Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

In *Garmon* this Court made it clear that violence cases were *sui generis;* for in such cases the "question to which review [had been granted] was restricted by the 'type of conduct' involved, *i.e.* 'intimidation and threats of violence.' " 359 U.S. at 248.

There was no violence or threat of violence in this case. There was no mass picketing. There was no interference with ingress or egress.[16] In short here, as in the *Garmon* and *Baumgartners* cases, damages based on peaceful union conduct have been awarded under state law. As in *Baumgartners* and *Garmon,* the award of damages should be set aside.

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[16]Respondent in his brief in opposition filed in this case argued — for the first time—that this case actually involved violence and intimidation, within the meaning of *Laburnum.* Since this contention is discussed in some detail in Local 20's reply brief and may or may not be renewed in Respondent's brief on the merits, we will for the present limit ourselves to the case as made in the district court and the court below.

C. When Congress enacted Section 303 it created a federal cause of action for actual damages; but except as to conduct therein defined as unlawful, Congress intended that damages would not be allowed for peaceful picketing and boycott activities.

At the outset we again point out that cases involving violence constitute a recognized exception to the principles under consideration. This case does not involve violence; hence such cases are not germane.[17] We are concerned, however, with a case in which Section 303 was invoked, compensatory damages awarded for conduct which did not violate Section 303, and punitive damages—which are not contemplated by Section 303—awarded. The argument which follows concerns itself with those damages.

The court below apparently thought it "implicit" in *Smith v. Evening News*, 371 U.S. 195, and *Local 100, Plumbers, v. Borden*, 10 L.Ed.2d 638, that "the preemption doctrine" is inapplicable "insofar as both Sec. 301 and Sec. 303" are concerned (R. 293). The court below cast the quoted comment in the form of a rhetorical question which cannot be answered without first defining the term "preemption."

Section 301[18] and Section 303[19] actions can be commenced in either state *or* federal court. In a Section 301, breach of contract suit, contract issues virtually identical in substance to unfair labor practice issues

[17] Nor are we dealing with a foreign flag vessel. *Incres. S.S. Co. v. Maritime Workers Union*, 372 U.S. 24; *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138.

[18] *Doud Box Co. v. Courtney*, 368 U.S. 502.

[19] Section 303(b) specifically authorizes "any court having jurisdiction of the parties" to entertain a case brought under Section 303.

may and often do arise. See *e.g. Carey v. Westinghouse Corp.*, 11 L.Ed.2d 320. But since Congress has given state and federal courts jurisdiction over such contract issues, the doctrine of exclusive National Board jurisdiction does not bar the suit. *Smith v. Evening News*, 371 U.S. 195. Similarly in every Section 303 boycott-damage action the issues—except for measure of damages—are identical to the issues in a National Board case under Section 8(b)(4). Obviously, since Congress gave state and federal courts jurisdiction to entertain Section 303 actions, the doctrine of exclusive National Board jurisdiction does not bar the suit.

This case,[20] however, *does not involve* conduct which is unlawful under Section 303. This case *does not involve* an award of compensatory damages under Section 303. This case does involve an award of compensatory and punitive damages under the common law of the State of Ohio. These incompatible rules of state common law have no role to play in the federal scheme.

"[A] main goal of Section 301 was precisely to end 'checkerboard jurisdiction,' *Seymour v. Schneckloth*, 368 U.S. 351, 358" *(Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 27); just as a main goal of Section 303 was to assure "uniformity, otherwise lacking, in rights of recovery in the state courts . . ." *United Construction Workers v. Laburnum*, 347 U.S. 656, 665-666. In other words, in a Section 301 or Section 303 action federal law alone controls; liability cannot be imposed under state law because state law has been totally displaced.

[20] At this juncture, only the common law compensatory and punitive damages are under discussion.

Cf.: *Machinists v. Central Airlines,* 10 L.Ed.2d 67, 75-76 fn. 17.

This Court held in *Teamsters Local 174 v. Lucas Flour Company,* 369 U.S. 95, 103 — an action under Section 301—that "incompatible doctrines of local law must give way to principles of federal labor law." Similarly, this Court in *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, a breach of contract case, invoked Section 301(b), which applies to both Section 301 and Section 303 actions, to bar a claim of damages against certain union officers and agents as individuals. The plaintiff, invoking diversity jurisdiction, sought to circumvent this federal rule of liability by pleading a state common law cause of action against the named officers and union members. Holding that Section 301(b) preempts (*i.e.,* establishes the sole measure of liability) state common law, this Court pointed out (370 U.S. at 249):

> "This policy cannot be evaded or truncated by the simpled evice of suing union agents or members, whether in contract or tort, or both, in a separate count or in a separate action for damages for violation of a collective bargaining contract for which damages the union itself is liable."

See also: *Humphrey v. Moore,* 11 L.Ed.2d 370;
Drivers Union v. Riss & Co., 372 U.S. 517.

To allow compensatory and punitive damages, not authorized by Section 303, is certainly to evade and truncate the policy of Section 303. Indeed, if state law is to be applied in Section 303 actions, peaceful primary picketing in protest of employer unfair labor practices may be made the basis of damage awards by the simple device of adding a separate count or ground and

invoking state laws in support of a Section 303 claim.[21] Congress itself in 1947 considered and rejected a legislative prohibition upon strikes in protest of employer unfair labor practices. H.R. 3020, as passed by the House, not only prohibited strikes in protest of unfair labor practices, but, in addition, subjected "sympathy" strikes, "illegal" boycotts, "jurisdictional" strikes and "monopolistic" strikes to National Board action and private damage actions. 1 Leg. Hist. 168-171, 204-206. In the Conference Committee, however, these restrictions were—in the main—rejected; the Senate bill, not the House bill, became the law (1 Leg. Hist. 571). The type of conduct to be made the subject of a private damage action and the measure of damages *(supra,* pp. 14-15) to be allowed were carefully considered by the Congress. Congress made its decision when it enacted Section 303.

"[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades v. Garmon,* 359 U.S. 236, 247. Accordingly, the same need for uniformity exists in actions under Section 301 and Section 303. As this Court explained in *Teamsters Local 174 v. Lucas Flour Co.,* 369 U.S. 95, 104:

> "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interest through a process

[21] The example is not far-fetched. Picketing of this type was held to be "coercive" and illegal in *Teamsters Local 795 v. Newell,* 181 Kan. 898, 317 P.2d 817, reversed *per curiam* 356 U.S. 341. Only the First Amendment saved the union from the brand of illegality.

> of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area, *California v. Zook*, 336 U.S. 725, 730, 731; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 231, we cannot but conclude that in enacting Sec. 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."

Some states permit awards of punitive damages, others do not. Some states have labor codes, others do not. Some states have "right to work" laws, others do not. If the policy of federal law is to prevail, the rules governing damage actions based upon peaceful picketing and boycotts must be uniform, federal rules. We deal here with an area "of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes rather than local law." *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176. Federal law does not authorize punitive damages. Federal law does not authorize recovery of compensatory damages for loss of the Launder account. Hence, Respondent was not entitled to recover such damages.

D. Federal labor law has preempted and occupied the field of peaceful picketing and boycotts; hence, there is no state law to which "pendent jurisdiction" can attach.

The preemption doctrine *(i.e.*, exclusive National Board jurisdiction), of course, applies with equal force to federal as well as state court proceedings. *San Diego Building Trades v. Garmon*, 359 U.S. 236, 245; *Weber v. Anheuser-Busch*, 348 U.S. 468, 479. And as we have demonstrated, under that doctrine neither compensatory nor punitive damages can be awarded for a common law secondary boycott. *Electrical Workers Local 426 v. Baumgartners Elec. Constr. Co.*, 359 U.S. 498, reversing *per curiam* 77 S.D. 286, 91 N.W.2d 663. We also have demonstrated that the nature of the conduct involved, when considered in light of the comprehensive federal regulation of such conduct, requires the conclusion the federal law and federal law alone controls. The federal law "describes and condemns specific union conduct directed to specific objectives . . ." *Carpenters Local 1976 v. Labor Board*, 357 U.S. 93, 98. "Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited" by federal law. *Ibid.* In short, there is no federal law authorizing damages for "secondary boycotts," as that term is defined by the common law. Cf. *Gill Engraving Co. v. Doerr*, 214 Fed. 111, 118 (S.D. N.Y.).

Since federal law alone controls the field of peaceful picketing, there exists no state law to which "pendent" jurisdiction can attach. Pendent jurisdiction assumes the existence of a state ground in support of a federal

claim. *Hurn v. Oursler,* 289 U.S. 238. Here there is no state ground. Therefore, there is no pendent jurisdiction.

Furthermore, the state courts correctly held that Respondent's claim of common law secondary boycott was subject to the preemption doctrine *(i.e.,* exclusive National Board jurisdiction) (R. 266). A federal court, when exercising either pendent *(Maternity Yours, Inc. v. Your Maternity Shop,* 234 F.2d 538, 540 note 1 (CA 2) or diversity *(Erie Railroad Co. v. Tomkins,* 304 U.S. 64, 78) jurisdiction, sits as a state court with respect to state claims. Since the state courts had no jurisdiction over Respondent's common law claim, the federal courts had none.

The decisions of this Court plainly indicate that where, as here, the entrance to the state courts is barred, insofar as a given state claim is concerned, the federal courts cannot open their back door to the plaintiff and adjudicate his claim under the guise of "pendent" jurisdiction. *Lauf v. E. G. Shinner & Co.,* 303 U.S. 323, 328; *Angel v. Bullington,* 330 U.S. 183, 191-192; *Woods v. Interstate Realty Co.,* 337 U.S. 535, 537-538. The *Lauf* case, for example, involved a suit in federal court for an injunction against picketing and boycott activities. Diversity jurisdiction was invoked. Holding that the federal court erred in granting an injunction, this Court said: "A Wisconsin court could not enjoin acts declared by the statute to be lawful; and the District Court has no greater power to do so." 303 U.S. at 328. In the case at bar, the Ohio courts had no authority to grant damages for a common law secondary boycott; "and the District Court has no greater power to do so."

Even if the Ohio common law were applicable—and it is not—this case is not an appropriate one for the exercise of pendent jurisdiction. *Hurn v. Oursler*, 289 U.S. 238, was misread and misapplied by the courts below. In the *Hurn* case, federal jurisdiction to protect a *copyrighted* play was invoked and sustained, both with regard to federal law and state law. "[T]he claims of infringement and unfair competition so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances," 289 U.S. at 246. But jurisdiction was disclaimed in the *Hurn* case insofar as the complaint alleged state common law violations of an *uncopyrighted* version of the same play. "From these averments two separate and distinct causes of action resulted, one arising under a law of the United States, and the other arising under general law. * * * [T]he latter is entirely outside the federal jurisdiction and subject to dismissal at any stage of the case." 289 U.S. at 248.

Respondent's proof of loss of the Launder account rested on a set of circumstances wholly separate and distinct from his proof of alleged Section 303 violations. Different times, places and persons were involved. In *Hurn* the claims based upon the copyrighted play rested upon virtually "identical facts"; the opposite is true in this case. The loss of the Launder account is comparable to the claim of unfair competition relating to the uncopyrighted play in *Hurn*. As such, is is "entirely outside the federal jurisdiction. . . ." 289 U.S. at 248.

Peaceful union conduct, lawful under Section 303

but unlawful under the common law of Ohio, is involved in this case. Repeatedly, this Court has said that such conduct is not amenable to state regulation. If viewed in light of Section 303 of the Act, it is nonetheless conduct amenable to regulation only if unlawful under Section 303. The comprehensive scheme of federal law has wholly occupied the field of peaceful picketing and boycotts. State law does not exist. Since there is no state law, there can be no "pendent" jurisdiction to administer non-existent state law. The power of the federal courts can be no greater than that of the state courts. Thus, under any view of "jurisdiction" it is manifest that the courts below erred in awarding compensatory and punitive damages under the common law of Ohio.

II. Section 303 of the Act Does Not Authorize an Award of Total Actual Damages Resulting Directly from a Lawful Primary Strike Merely Because the Union Also Engaged in Other Conduct Which Was Found To Be in Violation of Section 303

The courts below held that Local 20 engaged in certain conduct which violated Section 303 of the Act. The secondary employers whose employees were allegedly induced are France (no damages), Schoen (no damages) and O'Connell ($1,600 damages). These three customers are the *only* ones with respect to which a finding of Section 303 violation was made (R. 275-276). For purposes of argument, it is assumed that these findings are correct.[22] Respondent concedes, as

[22]Viewed most strongly in Respondent's favor, the evidence shows that Local 20 advised its steward employed by O'Connell of the strike against Respondent and requested him to refrain from using Respondent's trucks (R. 122). The steward had no occasion in the course of

he must, that there is "no evidence of unlawful activity in connection with [the Wilson] job" (R. 166). Yet the courts below assessed $9,300 compensatory damages because of a loss of revenue from the Wilson job (R. 289). These damages were awarded "under the totality of effort rule" (R. 284).

A. The Wilson job was lost as a proximate result of the primary strike.

It will be recalled that Local 20's strike against Respondent commenced on August 17, 1956 (R. 180, 185) and ended in early October, 1956 (R. 185). During the strike, Local 20 picketed peacefully at Respondent's premises (R. 25-26, 45-46, 63-64, 222-224). There was no interference with ingress or egress (R. 37-38, 63-64) and no physical injury to person or property at any time during the strike (R. 37-38, 197-199, 271, 282).

There is no evidence of any Local 20 contacts with any person employed by Wilson. There is no evidence of picketing or other activity by Local 20 at the Wilson job. There is no evidence that any person connected with Wilson had any knowledge of the Union's alleged unlawful conduct at Schoen, France, or O'Con-

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his employment to operate the trucks and had no authority to terminate Respondent's relation with O'Connell (R. 124). Accordingly, the steward reported his conversation to the O'Connell management (R. 122, 126). Upon learning that a strike had been called against Respondent, the O'Connell management arranged for other trucking services (R. 127). There were no strikes, picketing or threats of strikes or picketing against O'Connell (R. 129). On these facts it cannot be said that Local 20 inducted its steward to refuse to perform "services," and this is expressly required by the statute. *Compare*: *Ferro-Co. Corp.*, 102 NLRB 1660, 1661, 1666. The O'Connell account was lost as the result of a management decision (R. 129). In such circumstances, there is no violation of the Act. *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, 99.

nell. It is undisputed that Respondent himself advised Wilson of the strike and his inability to continue work for Wilson because of a lack of drivers due to the strike (R. 171, 173, 184).

Neither the opinions (R. 276-296) nor the findings (R. 269-276) below purport to make an express finding contrary to the preceding statement of facts. Some reliance (R. 274, 288), however, apparently was placed upon the testimony of one Taulbee. Taulbee, who was working for Respondent at the time of the trial, was one of the strikers during the 1956 strike (R. 194). On direct examination Taulbee testified that he didn't want to return to work because Local 20 had on occasion followed Respondent's trucks and "that would end up in me maybe getting hurt" (R. 197). There is no other similar testimony in the 683 page transcript of testimony.

The wholly frivolous character of Taulbee's testimony was revealed by the cross-examination which followed. On cross-examination, he admitted that "No one was hurt as I know of" (R. 197), that no one was "hurt on the picket line" (R. 198), that no trucks were damaged and no drivers were injured (R. 199), and that his asserted concern about "maybe getting hurt" (R. 197) was "based on a lot of talk . . . by . . . all the guys" (R. 199). Taulbee also admitted "I didn't support it [the strike] too much. I was mostly a bystander and the other guys talked it up, not me" (R. 198). This same employee attended the strike vote meeting and volunteered the information that he had "voted not to strike" (R. 198).

During the strike the lowest number of drivers actually working in any week was 20 (R. 252); and Taulbee admitted that he was aware of the fact the drivers were working during the strike (R. 198-199). In this connection he was asked (R. 199):

> "Q. The fact of the matter is that anybody that wanted to go in or out of those premises did so without anybody interfering with him in any physical manner, isn't that true?
>
> "A. Well, as far as I know it is. I never seen no trouble."

Finding of "fact" number 10 (R. 274) is based upon the Taulbee testimony discussed above. This finding of "fact" is to the effect that Local 20's following of Respondent's trucks discouraged the return to work "by an employee" of Respondent who did not want to "get followed or get hurt" (R. 274). The finding then asserts (R. 274):

> "* * * Accordingly, this activity made the strike of the Defendant against the Plaintiff more effective to prevent Plaintiff's employees from returning to work than it would have been but for such activity."

This finding is on its face an argument rather than a finding of fact and in light of the testimony set forth above is unsupportable either as an argument or a fact. Even if it were conceded, and it is not, that Taulbee harbored a genuine subjective fear, his testimony amounts to nothing. There is nothing in the record to indicate that any other employee was similarly affected and there is nothing in the Act which suggests that a union may be held accountable for the irrational fears of reluctant strikers.

Moreover, in the absence of violence or threat of violence — and there was none — a claim that peaceful picketing discourages would-be strike-breakers, employed by the primary employer, from working for the primary employer is completely irrelevant. Sections 7 and 13 of the Act guarantee the right to strike. And this guarantee is obviously broad enough to encompass an effort to discourage, by peaceful means, striking employees of the primary employer from working during the strike. "Picketing which is lawful primary picketing is not turned into unlawful secondary picketing because the picketing is effective against the primary employer and its employees. . . .". *Brownfield Electric Co.*, 145 NLRB No. 113, slip. op. pp. 4-5. Indeed, the right to engage in a primary strike exists independently of the Act. *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209.

Throughout the history of the Act, as applied to labor organizations, the National Board has recognized under the roving-situs doctrine the right of a union to follow the trucks of the primary employer to the premises of a neutral employer and to picket at the premises of the neutral employer while the truck of the primary employer was unloading. *United Plant Guards of America (Houston Armored Car Company, Inc.)*, 136 NLRB 110, 111; *Schultz Refrigerated Service*, 87 NLRB 502. Inducing striking employees of the primary employer to support a strike violates no federal law. Hence the finding that Local 20 discouraged Respondent's employees from working is not only unsupportable but is also irrelevant.[23]

[23]The record demonstrates only that Respondent's striking employee (Continued on Pg. 35)

In conclusion of this point, it is submitted that Respondent lost the Wilson account solely as a consequence of fact that his drivers were engaged in a peaceful, orderly strike. No other finding can be supported by the record.

B. The primary strike and picketing at Respondent's premises were affirmatively protected by the Act and by the First Amendment.

The strike was precipitated by Respondent's improper[24] demand that his competitors be organized before he be required to sign an agreement (R. 34-36, 40, 204, 205-207, 233, 241, 251-252, 253-260). Such strikes are affirmatively protected by Sections 7 and 13[25] of the

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knew the trucks were being followed on occasion. Even if the followed trucks were manned by *neutral* employees, and they were not, no violation would have existed. The mere following of trucks is not an "inducement." *Santa Ana Lumber Co.*, 87 NLRB 937.

[24]Respondent's position constituted a patent refusal to bargain in violation of Section 8(a)(5) of the Act. *Newton Chevrolet*, 37 NLRB 334, 341; *George P. Pilling & Son Co.*, 16 NLRB 650, 660-661, *aff'd* 119 F.2d 32 (CA 3); *J. Chesler & Sons, Co.*, 13 NLRB 1, 8-10; *Harbor Boat Building Co.*, 1 NLRB 349, 355.

[25]Sec. 7 (29 USC, Sec. 157) provides:

"Employers shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Sec. 13 (29 USC, Sec. 163) provides:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Act as well as by the First Amendment to the Constitution.[26]

Only three types of primary strikes were proscribed by Section 8(b)(4) and 303 of the 1947 Act;[27] namely, jurisdictional strikes, strikes to compel an employer to join a Union, and strikes in derogation of another Union's certification as bargaining representative [Section 303(a)(1), (3) and (4)]. Since Respondent has not and cannot bring his case within any one of these three exceptions to the right to engage in a primary strike, it should be concluded that Local 20's strike is entitled to the protection conferred by Section 13 of the Act.

From Section 13 of the Act, as well as from the legislative history of the Act, it is clear that "Congress did not seek, by Section 8(b)(4), to interfere with the ordinary strike . . ." *International Rice Milling Co. v. NLRB*, 341 U.S. 665, 672. Accordingly, the courts have consistently interpreted Section 8(b)(4)(A) and Section 303 not literally, but in "conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offend-

[26] *See e.g.: Teamsters Local 795 v. Newell*, 356 U.S. 341, *reversing per curiam* 181 Kan. 898, 317 P.2d 817; *Thornhill v. Alabama*, 310 U.S. 88; *Carlson v. California*, 310 U.S. 106.

[27] Section 8(b)(4), 29 USC 158(b)(4) and Section 303, 29 USC, Sec. 187, "have an identity of language" but specify two "different remedies." *Longshoremen v. Juneau Corp.*, 342 U.S. 237, 244. Section 8(b)(4) provides that certain conduct constitutes an unfair labor practice for which an administrative remedy is afforded. The same conduct also gives rise to a claim for damages cognizable in either state or federal courts. Since the two sections "have an identity of language," cases arising under both sections are relevant to this action. As a consequence of the 1959 amendments to the Act, Sec. 303 now incorporates by reference the prohibitions embodied in Sec. 8(b)(4).

ing employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692. *See also: Teamsters Local 728 v. Empire State Express*, 293 F.2d 414 (CA 5); *Haughton v. Woodworkers*, 294 F.2d 766 (CA 9).[28]

As more fully explained by this Court in *Electrical Workers Local 761 v. Labor Board*, 366 U.S. 667, 672:

> "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity. 'While § 8(b)(4) does not expressly mention "primary" or "secondary" disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's "secondary boycott sections."' *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 686. 'Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike . . .' *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672. The impact of the section was directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.' *International Brotherhood of Electrical Workers v. NLRB* (CA 2) 181 F.2d 34, 37. Thus the section 'left a striking labor organization free to use persuasion, including picketing, not only on the primary employer and his employees, but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer and persons dealing with them . . . and even employees of secondary employ-

[28] Both the *Empire* and the *Haughton* cases arose under Section 303.

> ers so long as the labor organization did not. . . . "induce or encourage the employees of any employer to engage in a strike or a concerted refusal in their course of their employment" . . .' *NLRB v. Local 294, International Brotherhood of T.C. W.H.* (CA 2) 284 F.2d 887, 889."

The Act and the decisions construing it accord peaceful, primary strikes a protected status; and damages, therefore, cannot be predicated upon injury flowing proximately from such strikes. Damages can be recovered in a Section 303 action only for "injury" to "business or property by reason of any violation of subsection (a)" of Section 303. Primary strikes do not violate Section 303(a).

C. Lawful, primary strikes do not lose their protected status merely because the Union contemporaneously engaged in unlawful acts.

The first set of cases, involving Section 8(b)(4) of the Act, to reach this Court posed the question of the extent to which the Act proscribed picketing at a construction site, occupied by several independent contractors. *Labor Board v. Denver Building and Construction Trades Council,* 341 U.S. 675. For obvious reasons, cases of this type came to be known as "common situs" cases.

Awarding damages for the loss of the Wilson account, the courts below invoked the "totality of efforts rule" expounded in *Carpenters Local 131 v. Cisco Construction Co.,* 266 F.2d 365 (CA 9), *cert. denied* 361 U.S. 826. *Cisco* involved picketing in support of a dispute with a general contractor. The picketing occurred at a common situs and at the wholly separate premises

of subcontractors with whom the union had no dispute. The Ninth Circuit, in the *Cisco* opinion, said (266 F.2d at 367, 369):

> "Generally, it may be said that the away-from-the-job site pressure, if it must be kept uncommingled with the job site picketing did no substantial damage. The damages which Cisco did suffer would appear to have been caused because the subcontractors' union men just would not cross the picket lines at the job sites. The trial court expressly found that the first picket line as originally established was not illegal. And we think it implicit in the court's decision, findings of fact and conclusions of law, that if there had been nothing more than picketing, without the addition of other activity directed at or through the subcontractors, then recovery might have been denied. So it appears that the primary question here is whether we may take a concept of the totality of effort, charging all damage to defendants.
>
> * * *
>
> "Of course, if the activities of the defendants must be strictly compartmentalized and the activities treated as wholly severable, then this court could be wrong. (Still it would always appear that the purposes of the original picket lines at a very early date acquired the secondary object as something very much in the forefront.)"

Perhaps the court in *Cisco* held only that unlawful acts can be taken into consideration in determining whether picketing at a common situs is actually directed at secondary employers. If so, the case has no application here. For in this case there is no possibility of a finding that the strike and picketing at Respondent's premises were designed to cause a work

stoppage of employees of a secondary employer. *Cf. Milwaukee Plywood Co. v. NLRB,* 285 F.2d 325, 328 (CA 7). Such a finding is impossible because there were no neutral employees or neutral employers working at Respondent's premises.

In any event, the "totality of efforts rule," as applied by the courts below, represents a wholly unwarranted extension of the exceedingly dubious *Cisco* opinion. As applied in this case, the "totality" rule has been invoked to hold Local 20 liable for injury proximately resulting from lawful acts. Such application of the "totality" rule is repugnant to the First Amendment, the language of the Act, and to common sense.[29] As we have demonstrated, Local 20's primary strike activities at Respondent's premises were protected by the First Amendment; and paraphrasing this Court's opinion in *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U.S. 287, 296, such protection is not "forfeited because of disassociated acts." See also: *Youngdahl v. Rainfair,* 355 U.S. 131, 139.

Section 303(b) authorizes an award of damages only in the event of injury "by reason of any violation

[29]Respondent conceded during the trial that there was "no evidence of unlawful activity in connection with the [Wilson] job" (R. 166). This concession prompted the district court to remark: "I think it is so remote that it requires some mental gymnastics to connect the matter up" (R. 167). Nevertheless, the district court awarded damages based upon the Wilson account.

The Wilson account damages are no less "remote" than the Seneca County damages which the district court refused to assess (R. 201, 271-272, 283-284). In both the case of Wilson (R. 171, 173) and Seneca County (R. 151), Respondent's customer learned of the strike from persons having no connection with Local 20 and upon learning of the strike arranged for substitute trucking services. Disparate treatment of the two claims is without factual or theoretical basis. Both claims should have been denied.

of subsection (a)." Primary strikes do not violate subsection (a) of Section 303 of the Act. Surely if Respondent had filed a complaint praying for damages upon the allegation that Local 20 had engaged in a primary strike, the courts would summarily dismiss the complaint. The very purpose (and sole value) of primary activities is to cause economic loss to the primary employer. If he may recoup these losses when a union also engages in other conduct which crosses the less than "glaringly bright line" (*Electrical Workers Local 761 v. Labor Board*, 366 U.S. at 673) separating permissible from prohibited conduct, then the exercise of primary activities becomes hazardous indeed. Thus to sustain an award of damages for losses resulting proximately from primary activities upon a theory of "totality" of effort is to do by indirection that which cannot be done directly. There is no legislative warrant for directly or indirectly awarding damages based upon injury resulting from primary activities.

Even if tort standards were applied, and they should not be (*Douds v. International Longshoremen's Assoc.*, 224 F.2d 455, 459 (CA 2), *cert. denied* 350 U.S. 873), it is still the rule that damages can be awarded only where the "loss is the direct and necessary result of defendant's wrongful conduct . . ." *Cranston Paint Works Co. v. Public Service Co. of N.C.*, 291 F.2d 638, 649 (CA 4). See also: 15 Am. Jur., "Damages," Secs. 138 and 155. The explicit language of the Act as well as its legislative history bespeaks a clear intent to authorize the recovery of actual damages only. *Mine Workers v. Patton*, 211 F.2d 742, 749-750 (CA 4); *Overnight Transportation Co. v. International Broth-*

erhood of Teamsters, 257 N.C. 18, 125 S.E.2d 277. In short, the statute adopts the "basic principle underlying common law remedies that they shall afford only compensation for the injury suffered." *Illinois C. Ry. Co. v. Crail,* 281 U.S. 57, 63. As stated in *Guido v. Hudson Transit Lines,* 178 F.2d 740, 743 (CA 3): "Damages are support to compensate the injured person for the wrong which has been done him." Or as stated in *Central Coal & Coke v. Hartman,* 111 Fed. 96, 98 (CA 8):

> "Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. * * * These are fundamental principles of the law of damages."

The *Cisco* case, as construed by the courts below, is at war with these elementary and fundamental principles. The National Board, on one occasion, relied upon the *Cisco* decision and adopted a "totality" theory of the type contended for by Respondent. *McJunkin Corporation,* 128 NLRB 522, 525.

With respect to the NLRB's decision in *McJunkin,* the United States Court of Appeals for the Seventh Circuit, in *Milwaukee Plywood Co. v. NLRB,* 285 F.2d 325, 329 (CA 7), commented:

> "At the oral argument, counsel for petitioner invited attention to and relied upon a decision of the Board which was handed down August 9, 1960. *McJunkin Corporation,* 128 NLRB No. 57. This is a 3 to 2 decision by the Board. *Some kind of a theory of 'totality of efforts' is there suggested whereby three incidents, by themselves lawful, become unlawful by an incident at another location.*" (Emphasis added)

More significantly, however, the National Board's decision in *McJunkin* was appealed to the United States Court of Appeals for the District of Columbia. The Court reversed the National Board's decision in a *per curiam* opinion. *Chauffeurs Local 175 v. NLRB (McJunkin Corp.)*, 294 F.2d 261 (CA DC). The Court stated in full, as follows:

> "In aid of a strike against McJunkin Corporation in Charleston, West Virginia, the union (1) picketed its plant, (2) told employees of neutral trucking concerns, over the telephone, that the plant was being picketed, expressly or impliedly asking them to respect the picket line, and (3) at the premises of one neutral concern, Miami Transportation Company, induced its employees not to unload a McJunkin truck for transportation. This last was a clear violation of Section 8(b)(4) of the National Labor Relations Act as amended, 29 U.S.C., Sec. 158(b)(4)(A), but there was no evidence that any other action of the union had any illegal purpose or effect. The Board's order is apparently intended to prevent the union from inducing employees of any trucking concern to respect the picket line at McJunkin's plant. *But peaceful primary picketing and its normal incidents, including requests to neutrals not to cross the picket line, cannot be forbidden though the Union has acted illegally elsewhere.* The case will be remanded to the Board with directions to modify its order so that it will not be broader than the one the hearing examiner had recommended." (Emphasis added)

The National Board has made no effort to revive the discredited "totality" rule.

The record evidence compels the conclusion that Re-

spondent lost the Wilson account solely as a result of the primary strike. It is equally clear that the primary strike was affirmatively protected by the First Amendment to the Federal Constitution and by Sections 7 and 13 of the Act. Common sense, the preponderance of authority, and the express language of the Act compel the conclusion that financial loss, proximately resulting from lawful acts, cannot be recovered in an action under Section 303 of the Act. The award of damages based upon the loss of the Wilson account therefore should be reversed.

CONCLUSION

Peaceful picketing and boycott activities lawful under federal law were, in this case, the predicate of a substantial damage award. The activities were of the type repeatedly held to be subject to the exclusive jurisdiction of the National Board. It is true that state and federal courts have authority to assess compensatory damages for conduct which is in terms prohibited by Section 303. But having exercised such jurisdiction the court has exhausted its power. Federal law establishes the rule of liability and the measure of damages. There is no state law to which "pendent" jurisdiction can attach.

Section 303 authorizes an award of compensatory damages for injury proximately caused by conduct which violates Section 303. There is no statutory warrant for an award of damages for injury proximately caused by lawful, primary activities. Indeed, to award damages for such losses is to make a mockery of Sections 7 and 13 of the Act which guarantee the right to strike.

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Section 303 of the Labor Management Relations Act of 1947 provided:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under sub-chapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."